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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 168.

PETER F. KENDALL, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 14, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 168.

PETER F. KENDALL, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 U. S. Court of Claims.

Petition.

PETER F. KENDALL
vs.
THE UNITED STATES. } No. 6830. Filed Nov. 22, 1872.—J. R.

To the honorable the Court of Claims:

Peter F. Kendall, of the city of New Orleans and State of Louisiana, complaining of a wrong, by breach of contract, respectfully prefers his petition as follows, to wit:

1st. That he is a citizen of the United States and resident in the State of Louisiana.

2nd. That during the late rebellion the United States owned and used in their service a valuable steam transport, called Porter, which, by hostile means used in aid of the rebellion, was sunk in Mobile Bay, in the State of Alabama; and petitioner, owning and having in his possession engines, pump, and other apparatus adapted to the business of raising sunk boats and vessels, and understanding that business, one Captain Steward, in the service of the United States, as assistant quartermaster, and having competent authority, proposed to petitioner to pay him for and on behalf of the United States the sum of ($15,000) fifteen thousand dollars, if he would raise the said steam transport Porter, sunk in Mobile Bay, as aforesaid. Whereupon a contract in writing was duly made and entered into, by and between your petitioner on the one part, and the United States on the other part, whereby your petitioner undertook and engaged to raise the said steam transport Porter, and, in consideration of which service, the United States engaged and became obligated to pay to him the said sum of fifteen thousand dollars. Relying on the validity and binding obligation of said contract, and the pledge of the public faith thereby in-
2 volved, your petitioner went to work in the use of his machinery and apparatus aforesaid, and at great expense to himself, and performed the said contract on his part, fully and to the letter, by raising the said steam transport and restoring the same to the service of the United States, and which was subsequently sold by the United States for a large amount, and is still in use on the Mississippi River.

3rd. Your petitioner, after the performance of the said contract on his part as aforesaid, called on the said Captain Steward, and, presenting the duplicate of said contract held by him, respectfully requested the payment of the said compensation which had been promised him as aforesaid; but the said Steward not only refused the payment, but took your petitioner's duplicate of the contract and tore it up and destroyed it in his presence, by means of which your petitioner is unable to attach a written copy of said contract to his petition; but the said contract in writing being on file in the War Department of the United States, he prays that an order of this court be made, requesting a copy thereof for use in this case.

4th. Your petitioner further states that he was unfortunately in the service of the Southern Confederacy until the close of active hostilities, and was, therefore, deprived of an effective remedy for redress in the

premises in the courts of the United States at the time of the commission of the wrong aforesaid; but he avers that he is entitled to and has received full pardon and amnesty granted by the authority of the United States as promulgated in the proclamation of the President of the 25th of December, 1868, whereby his disabilities were removed, and he was from that time restored to all his rights, privileges, and immunities under the Constitution and laws of the United States.

5th. Petitioner therefore avers that he is entitled to receive from the United States the said sum of fifteen thousand dollars, with interest thereon from the day of , A. D. 1865, on account of said contract and the valuable service rendered under it as aforesaid.

6th. Your petitioner further represents that not only did said Assist-
3 ant Quartermaster Steward refuse payment and destroy petitioner's duplicate of the contract as aforesaid, but he seized the engines, pump, and machinery belonging to petitioner, which he (petitioner) had used in raising the said steam transport, and appropriated the same to the use and benefit of the United States; and the said engines, pump, and apparatus having been taken from petitioner and appropriated to the actual use and benefit of the United States as aforesaid, and petitioner having waived the tort, an implied contract has arisen, requiring on the part of the United States the payment to petitioner of the amount which the said engines, pump, &c., were fairly and reasonably worth at the time and place of the seizure of the same as aforesaid; and petitioner avers that the said engines, pumps, &c., were fairly and reasonably worth ($4,000) four thousand dollars at the time and place of their seizure as aforesaid, which amount, on account of said implied contract, your petitioner is entitled to receive from the United States.

Wherefore petitioner asks judgment for nineteen thousand dollars with the interest thereon.

P. F. KENDALL,
Petitioner.

T. W. BARTLEY & J. G. EUSTIS,
Attorneys for Claimant.

STATE OF LOUISIANA,
City of New Orleans, ss:

Personally appeared before me, the subscriber, a commissioner of the United States in and for the city and State aforesaid, Peter F. Kendall, to me personally well known, who made oath in due form and according to law that the statements made in the foregoing petition are true; that no assignment or transfer of the claim as therein set forth, or any portion thereof, or any interest therein, has ever been made.

P. F. KENDALL.

Witness my hand and seal this 12th day of November, A. D. 1872.
[L. S.] ALFRED INGRAHAM,
Com. of the United States.

4 *Traverse.—Filed Feb.* 6, 1873.

In the United States Court of Claims, December term, A. D. 1872.

PETER F. KENDALL
vs.
THE UNITED STATES. } No. 6830.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of nineteen thousand dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation.

WILLIAM MCMICHAEL,
Assistant Attorney-General.

5 *Plea of limitation.—Filed Aug.* 14, 1874.

PETER F. KENDALL
vs.
THE UNITED STATES. } No. 6830. Plea.

Now come the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain his suit against the defendants for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

JOHN GOFORTH,
Assistant Attorney-General.

6 *Motion to strike out plea.—Filed Dec.* 16, 1878.

The claimant, by P. W. Bartley & J. W. Douglas, his attorneys, move the court to strike from the files of the court in this case the defendants' plea of the statute of limitations, because filed in violation of rule 5 of the revised rules of the Court of Claims, and for other grounds.

BARTLEY & DOUGLAS,
Claimant's Attorneys.

The above motion was overruled Feb. 10, 1879.

The chief justice read the following opinion.

7 *On motion.*

DRAKE, Ch. J., delivered the opinion of the court:

The fifth rule of this court, as heretofore existing, required that a plea of limitation should be filed within sixty days after the filing of the petition.

In this case the petition was filed November 22, 1872, and the plea of limitation August 24, 1874.

The claimant moves to strike the plea from the files, because it was not filed within the time prescribed by the rule.

The motion must be overruled, but on grounds entirely disconnected with the rule.

When the petition was filed, it was provided by section 10 of the act of March 3, 1863 (12 Stat. L., 765), "That every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of this act, within six years after the claim first accrued: Provided, * * * That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court, or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

This provision is embodied in section 1069 of the Revised Statutes.

The consideration of the pending motion has brought before us the question whether, under that provision, it is necessary for the government to plead the bar there prescribed in order to avail itself of it; and we are all of the opinion that it is not.

There is a great difference between the terms of this act and those of any other statute of limitations that we have found.

We are not aware of any such statute that declares a demand barred if not sued on within the prescribed time; but the prescription always applies solely to the right of action thereon.

The plea of the statute in a suit between individuals is a personal privilege, of which the defendant may or may not avail himself, as he pleases. If he does not interpose it, he is deemed to waive it; and no court will set it up for him, no matter how plainly it appears on the face of the declaration or petition that the action is barred; for it is his duty to inform the court that he demands the protection of the statute; and to give notice thereof, also, to the plaintiff, who might be within some of the exceptions mentioned in the statute, and should have opportunity to set up that fact in replication.

But the parties to a suit in this court have a very different relation to each other from that of individuals in other courts. This court is
8 established to enable claimants to prosecute claims against the United States, which they could not do except by the permission of the government, given by law. And when they come here in pursuance of that permission, they come subject, of course, to all the statutory

terms prescribed by the law-making department of the government, and there is no power in this court to admit them here as suitors on any other terms, nor to go beyond the line of jurisdiction laid down for it by the law, nor to remove or disregard any barrier which the legislature has erected, nor to interpose any that that body has not prescribed. And the legislative voice must be held to be always speaking through the laws, without dependence upon any government officer's action in any suit; and it is the duty of this court always to know what that voice is, and to obey and enforce it, whether invoked thereto by any such officer or not.

When, therefore, the law declares that "A claim shall be forever barred unless the petition setting forth a statement of the claim be filed in the court within six years after the claim first accrues," it is in effect a standing and ever-present plea of limitation, which the court is bound to take cognizance of in every case, without regard to whether the law officer of the government in charge of cases here has or has not filed a written plea setting up the limitation, and to give it practical effect by inquiring, ex mero motu, whether, on the face of the petition or by the evidence, it appears that the period limited by the law had expired before the petition was filed, and, where it had expired, to dismiss the suit, unless the claimant avers and proves the existence of some legally-recognized disability which prevented his resort to this court within the prescribed time.

If the petition in any case shows on its face that the claim first accrued more than six years before the petition was filed, it is a fatal obstacle to any relief here, unless the petition go on to set forth a disability.

If, as in the present case, the petition do not show when the claim first accrued, the court must wait till the evidence discloses the fact, and then act.

It follows from these views that the defendants were entitled to set up in defense the limitation; and as they chose to file a plea to that effect, the plea is entitled to remain on file.

The motion to strike it out is therefore overruled.

9 *Motion of defendants to dismiss plaintiff's petition under Rule I.—Filed Feb.* 28, 1879.

The Attorney-General, on behalf of the United States, respectfully represents that by the evidence taken in this case it appears that the alleged claim set forth in the petition filed by the plaintiff on the 22nd day of November, 1872, first accrued before the 21st of November, 1866; wherefore he prays that said petition be dismissed.

THOMAS SIMONS,
Assistant Attorney-General.

10 *Order.—Entered March* 17, 1879.

On the above motion to dismiss, the following order was entered March 17th, 1879:

Ordered, That the motion to dismiss this case be sustained unless within twenty days the claimant amend his petition setting up the existence and duration of a lawful disability which prevented him from filing a petition in the court within six years after the alleged claim first accrued.

11 *Amendment to the petition.—Filed March* 28, 1879.—J. R.

The claimaint now comes and by leave of the court amends the petition in this case by the addition of the following averments, to wit:

1st. That the contract in the petition mentioned was made and entered into some years prior to the filing of the petition, to wit, on or about the first of November, 1865; and the refusal of the quartermaster, acting for and on behalf of the United States, to pay the claimant the said stipulated compensation for the said service contracted for, after the said sunk steamer had been raised and placed on or at the wharf in Mobile Bay, as in the petition is averred, took place and occurred some years ago, to wit, on or about the last day of December, 1865.

2d. That by virtue of the 12th section of the statute of the 3d of March, 1863, for the reorganization of the Court of Claims, it was provided that in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it should be set forth in
12 the petition that the claimant had at all times borne true allegiance to the Government of the United States, and whether a citizen or not, that he had not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government. And the rules of the Court of Claims, in conformity with said statute, made it an essential requisite that the petition setting forth the above fact should be verified on oath.

This claimant, therefore, being under the disability in the petition mentioned, could not institute his suit within the jurisdiction of this court on a petition verified on oath until the said disability was removed by the general pardon and amnesty of the 25th day of December, 1868.

PETER F. KENDALL,
By T. W. BARTLEY,
His Attorney.

THE CITY OF WASHINGTON,
District of Columbia, ss:

Personally came T. W. Bartley this 28th day of March, 1879, and made oath in due form according to law, that he is the duly authorized attorney of the above-named claimant, and that the statements made in the foregoing amendment to the original petition are true, according to his knowledge, information, and belief.

T. W. BARTLEY.

Sworn to and subscribed before me this 28th March, 1879.

JOHN RANDOLPH,
Ass't Cl'k C. C.

13 *Demurrer to the amended petition.—Filed Apr.* 8, 1879.

And the said defendants, by their Attorney-General, say that the amended petition, filed March 28, 1879, is not sufficient in law.

THOMAS SIMONS,
Assistant Attorney-General.

14 *Order sustaining demurrer (entered May 5, 1879,) and judgment.*

A a Court of Claims held at the Capitol, Monday, May 5, 1879, the following entry was made of record:

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v.
THE UNITED STATES. } No. 6830.

The chief justice read the opinion of the court, and counsel for the claimant declining to make any further amendment to the petition, it was ordered that the demurrer thereto be sustained and the claimant's petition be dismissed.

The chief justice read the following opinion:

15 *On demurrer.*

DRAKE, Ch. J., delivered the opinion of the court.

The petition in this case did not show on its face the time when the alleged cause of action accrued.

The defendants pleaded to it the statute of limitation; but the plea was not filed within the time prescribed by the then existing rule of the court. The claimant moved to strike out the plea, because it had not been filed within the prescribed time. The motion was overruled, because, in the judgment of the court, no plea of limitation was necessary, but as one had been filed it was entitled to remain on file.

At the time of the announcement of the judgment on that motion the court made an amendment of its rules in the following terms:

"If upon the face of the petition the claim seems to have first accrued more than six years before the petition was filed, the claimant must aver therein the existence and period of duration of some disability, recognized by law, which prevented his filing his petition within that time; in default whereof it will be considered that no such disability existed, and the petition may be dismissed on motion. The averments in regard to any such disability shall be held to be put in issue by the general traverse.

"If upon the face of the petition the claim does not seem to have first accrued more than six years before the petition was filed, but the fact appears in evidence, the defendants may take advantage thereof at any time by motion; but upon the claimant's request leave will be granted to him to amend the petition by averring the existence and duration of a disability, and to make proof thereof."

In consequence of the adoption of this rule the claimant amended his petition by adding thereto the following clauses:

"1st. That the contract in the petition mentioned was made and entered into some years prior to the filing of the petition, to wit, on or about the first of November, 1865; and the refusal of the quartermaster, acting for and on behalf of the United States, to pay the claimant the said stipulated compensation for the said service contracted for, after the said sunk steamer had been raised and placed on or at the wharf in Mobile Bay, as in the petition is averred, took place and occurred some years ago, to wit, on or about the last day of December, 1865.

"2d. That by virtue of the 12th section of the statute of the 3d of March, 1863, for the reorganization of the Court of Claims, it was provided that, in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it should be set forth in the petition that the claimant had at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, that he had not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government. And the rules of the Court of Claims, in conformity with said statute, made it an essential requisite that the petition setting forth the above fact should be verified on oath.

"This claimant, therefore, being under the disability in the petition mentioned, could not institute his suit within the jurisdiction of this court on a petition verified on oath until the said disability was removed by the general pardon and amnesty of the 25th day of December, 1868, and his cause of action did not accrue to him till that time."

To the petition as thus amended the defendants demur; and the question raised by the demurrer is whether the amendment avoids the statute of limitation by setting up a recognized legal disability on the part of the claimant to bring the suit within six years after the claim first accrued.

16 It now appears by the amended petition that the cause of action accrued on or about the last day of December, 1865; but the original petition was not filed until the 22d of November, 1872—more than six years after the cause of action is averred to have accrued.

It follows, therefore, that the claimant cannot maintain his action, unless the disability set up in the second clause of his amendment to the petition be such as to prevent the statute from running in bar of his claim.

The disability which he avers is, in substance, that he was a rebel during the war of the rebellion, and therefore could not make oath to a petition in this court averring that he had at all times borne true allegiance to the Government of the United States, and had not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

This presents the same question that was before us in Sierra's case (9 C. Cls., 224), where we held that a rebel cannot avoid the effect of the limitation by setting up his own voluntary self-disqualification, through his acts of rebellion, to sue in this court.

The only disqualifications recognized by the law as avoiding the bar of the limitation are set forth in the proviso to the tenth section of the act of March 3, 1863 (12 Stat. L., 765, ch. 92), as follows:

"And provided further, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court, or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

Here not only are the disabilities enumerated which may avoid the lim-

itation, but it is expressly declared that "no other disability than those enumerated shall prevent any claim from being barred."

The disability here pleaded is plainly no barrier to the operation of the limitation; and it follows that the amended petition shows that the claimant has no cause of action which can be maintained in this court; and the petition must therefore be dismissed.

17 *Application for the allowance of an appeal (filed Aug. 2, 1879), & allowance.*

PETER F. KENDALL
v.
THE UNITED STATES.

From the judgment rendered in the above-entitled cause on the 5th day of May, 1879, in favor of the defendants, the claimant, by T. W. Bartley, his attorney, on the 2nd day of August, 1879, makes application for and gives notice of an appeal to the Supreme Court of the United States.

T. W. BARTLEY,
Att'y of Claimant.

Allowed.

C. D. DRAKE, *C. J.*

18 In the Court of Claims.

PETER F. KENDALL
vs.
THE UNITED STATES. No. 6830.

I, Archibald Hopkins, clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the *of the* motion to strike out plea of limitation, and the opinion overruling the same; of the motion of the defendants to dismiss the petition, and the order of the court upon the same; of the order sustaining the demurrer, and the opinion thereupon; of the application for the allowance of an appeal, and the allowance of the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 1st day of October, 1879.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsement on cover:) No. 168. Peter F. Kendall, appellant, vs. The United States. Court of Claims. Filed 14th January, 1880.

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OFFICE SUPREME COURT U. S.
FILED
JAN 29 1883
JAMES H. MCKENNEY, CLERK

17-12

In the Supreme Court of the United States.

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PETER F. KENDALL, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

No. 168.

—:-0-:—

BRIEF FOR APPELLANT.

BY

T. W. BARTLEY, HIS ATTORNEY.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

Peter F. Kendall, the appellant, on the 22d day of November, 1872, filed his petition in the Court of Claims for a breach of contract made on behalf of the United States with himself, in which he sets forth:

1st. That he is a citizen of the United States and resident in the city of New Orleans, State of Louisiana;

2d. That the United States owned a valuable Steam Transport, called "Porter," which was used in their military service during the late rebellion, and by the casualties of war sunk in Mobile Bay in the State of Alabama. And appellant, Kendall, owning and having in his possession, engines, pumps, and other apparatus adapted to the business of raising sunk boats and vessels, and understanding that business, one Captain Steward, an assistant quartermaster in the service of the United States, having competent authority, proposed on behalf of the United States to pay to appellant the sum of fifteen thousand dollars if he would raise said steamer and restore it for use. Whereupon a contract in writing was duly made between appellant on the one part, and the United States on the other part, whereby appellant engaged and obligated himself to raise and restore to use said steamboat, in consideration of which service the United States agreed and became obligated to pay to him the said sum of fifteen thousand dollars. On the faith of this contract appellant, by the use of his machinery and apparatus, at great expense to himself,

OFFICE SUPREME COURT, U.S.
FILED
JAN 29 1883
JAMES H. MCKENNEY, CLERK

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In the Supreme Court of the United States.

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PETER F. KENDALL, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

No. 168.

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2d. That the United States owned a valuable Steam Transport, called "Porter," which was used in their military service during the late rebellion, and by the casualties of war sunk in Mobile Bay in the State of Alabama. And appellant, Kendall, owning and having in his possession, engines, pumps, and other apparatus adapted to the business of raising sunk boats and vessels, and understanding that business, one Captain Steward, an assistant quartermaster in the service of the United States, having competent authority, proposed on behalf of the United States to pay to appellant the sum of fifteen thousand dollars if he would raise said steamer and restore it for use. Whereupon a contract in writing was duly made between appellant on the one part, and the United States on the other part, whereby appellant engaged and obligated himself to raise and restore to use said steamboat, in consideration of which service the United States agreed and became obligated to pay to him the said sum of fifteen thousand dollars. On the faith of this contract appellant, by the use of his machinery and apparatus, at great expense to himself,

succeeded in performing the contract on his part by raising the steamer, cleaning it out, and restoring it to the use and service of the United States fully, so that the Government was enabled to sell the same afterwards for a large amount.

3. That appellant, after the full performance of said contract on his part, called on said quartermaster, and presenting the duplicate of said contract held by him, respectfully requested payment of the compensation stipulated to be paid him as aforesaid. But said quartermaster not only refused payment, but took appellant's copy of the contract, and tore it up and destroyed it in his presense. And appellant never having been paid anything whatever, claims to recover the amount stipulated in his contract with interest.

4th. And appellant, further complained that said U. S. quartermaster not only refused payment and destroyed appellant's contract as aforesaid, but he, by means of a military force, seized the engines and machinery belonging to appellant, which had been used in raising the steamer as aforesaid, and appropriated the same to the use and benefit of the United States, and thus robbed appellant of this property of his own, which he alleges was worth at the time at least four thousand dollars. And appellant having waived the tort as to this property which the United States received, and had the full use thereof, claimed a recovery for the full amount which said property was fairly and reasonably worth at the time of its seizure and appropriation as aforesaid.

The Assistant Attorney General, on the 6th day of February, 1873, filed a plea of the general issue to the petition, denying—

1st. The allegations of the petition;

2d. The alleged indebtedness of the United States;

3d. The loyalty of the petitioner.

Testimony having been taken sustaining the allegations of the petition, the attorney for the government, on the 14th of August, 1874, without withdrawing the plea of the general issue aforesaid, and without leave of the court, filed a plea of the statute of limitation of six years, averring that the suit had not been brought within six years from the time the claim first accrued.

The petition contained the averment that petitioner had been in the service of the Southern Confederacy, and had given aid thereto, and was without remedy for the wrong done to him, and had no valid claim against the United States, which he could enforce, or which was cognizable by the Court of Claims until the general pardon and amnesty

of the President of the United States, granted on the 25th day of December, 1868. And the suit was brought within six years from the time when the claim thus accrued and became judicially cognizable as a claim against the United States.

On the 16th day of December, 1878, the petitioner, in the Court of Claims, filed a motion to strike from the files of the court the plea of the statute of limitations, because filed in violation of Rule 5 of the Revised Rules of the Court of Claims, and *for other grounds*.

Rule 5 of the Revised Rules of the Court of Claims was in these words, "Demurrers to petitions, general traverses thereof, and pleas of limitation, must be filed within sixty days after the filing of the petition."

After the motion to strike from the files the plea of the statute of limitations had been argued, and submitted, the court rescinded and expunged said Rule 5, and then overruled the motion, to strike the plea from the files, and sustained the plea. This all appears on the records in the Court of Claims, but the repeal of Rule 5 has been excluded from the record sent up here.

On the 28th February, 1879, the defendants representing to the court, that the evidence taken in the case, showed that the claim first accrued before the 21st of November, 1866, moved to dismiss the petition.

On this motion the court, on the 17th of March, 1879, ordered that *the motion to dismiss be sustained, unless within twenty days the claimant amend his petition*, setting up the existence and duration of a *lawful disability*, which prevented him from filing a petition in the court within six years after the alleged claim first accrued.

On the 28th of March, 1879, the appellant amended his petition, showing, *in substance*, that the contract was made in November, 1865, and that the breach of it on the part of the United States took place about the last day of December following, that is in 1865, and that as the law then stood his wrong was without a remedy, that it was *damnum absque injuria*, and that no claim against the United States, cognizable in the Court of Claims, accrued to him until after the general pardon and amnesty of the 25th day of December, 1868.

And this amended petition was demurred to by the attorney for the Government on the 8th of April, 1879.

And on the 5th of May, 1879, the Court of Claims sustained this demurrer and dismissed the petition.

And from this judgment the appeal was taken.

Of the short record in this case—only nine pages—the opinions of the chief justice of the court, explaining the grounds of the decisions, fills four pages, being nearly half the whole record.

The proceedings of the court in expunging or repealing Rule 5 of the *Revised Rules* in order to be able to overrule appellant's motion to strike from the files the plea of the statute of limitation, which had been first waived, and then filed out of rule, were not allowed to be made a part of the record!

Also *the evidence* on file proving the truth of the allegations of the petition, although referred to, and made *the ground of the motion* of the Assistant Attorney-General *to dismiss the petition, and which motion the court sustained in dismissing the petition*, was not allowed to be made a part of the record. (See p. 5 of Record.)

ARGUMENT.

It is claimed on behalf of the appellant that there was error in the proceedings of the Court of Claims as shown in the record in several particulars, to wit:

1st. It appears to be well settled, both in England and in this country, that in actions *ex contractu* the defense of the statute of limitation, both at law and in equity, *must be pleaded*. Stile *vs.* Finch, Cro. Car., 404; Gould *vs.* Johnson, 2 Lord Raym. R., 838; Bricket *vs.* Davis, 21 Pick. (Mass.) R., 404; Jackson *vs.* Varick, 2 Wend. N. Y. R., 294; Angell on Lim., p. 301–2, secs. 285–6.

A plea of *nil debit*, or of the general issue to the allegations of the petition, is *a waiver* of the plea of the limitation of actions.

And after this a party is not allowed to amend and plead the statute of limitations.

2d. The plea of the statute, in this case, *after waiver, and without withdrawing the former pleas*, or *leave to amend* was filed, and *that* out of rule, and in positive violation of the rule of the court. The motion to strike the plea of the limitation of actions from the files should have been sustained:

1st. Because the plea was filed in violation of a positive rule of the court;

2. Because it had been waived by previous pleas;

3. Because filed without withdrawing, or disposing of previously filed pleas, and without leave of the court to amend pleadings previously filed.

3d. The court erred in sustaining the plea of the statute of limitation, and overruling the motion to strike it off, when it was filed in violation of a positive rule of the court, and that, too, when the case was already at issue on pleas previously filed by the defendantsand undisposed of.

4th. The action *was brought within six years from the time when the claim first accrued to appellant in a form "cognizable by the Court of Claims."*

The language of the statute is: "Every claim against the United States *cognizable by the Court of Claims*, shall be forever barred, unless the suit be brought 'as provided by law,' within *six years after the claim first accrued*," &c. This limitation applies only to claims "cognizable by the Court of Claims," &c. Now, the claim here in question did not become cognizable by the Court of Claims until the general pardon and amnesty of the President on the 25th of December, 1868. And the record shows that this suit was brought on the 22d day of November, 1872, within the six years.

It has been repeatedly decided by the Court of Claims, and sustained by this court, that such a claim as that of appellant, as it stood before pardon and amnesty, was not within the jurisdiction of that court and, therefore, *not cognizable by it.*

"*The claim*" mentioned in the statute, for which the remedy is afforded, must be *a chose in action* the essential characteristic of which is that it is *actionable*, that is, *cognizable* in court and capable of being judicially enforced. Until it becomes such a claim the statute of limitations cannot run against it. (Williams on Per. Estate, pp. 4, 5 and 6.)

Prior to pardon and amnesty, the claim of appellant was what is termed in law "*damnum absque injuria*," a loss for which no recompense can be obtained. (Tayler's Law Glossary, p. 83.) At all events it was not "cognizable in the Court of Claims," and, therefore, the statute did not run against it till after pardon and amnesty. After this the claim became cognizable in the Court of Claims; first, because the appellant thereby became capacitated to sue on it in the Court of Claims; and, second, because of the express restoration of all rights of property in the pardon granted. (15 Statutes at L., p. 712.)

By the Constitution, the pardoning power was vested in

the President. So that the pardon granted became valid under the law of the land.

Upon reason and upon principle the statute of limitation is based upon *prescription*, the means whereby title to property is acquired against a former owner by lapse of time, and his neglect to assert and vindicate his right or title to the property for the time prescribed. And the legal presumption against the former owner arises from his neglect to prefer his claim within the period of the limitation. But how unreasonable, how unjust, how abhorrent to all sense of right and fairness, to assert that the presumption arises and the statute runs against a man when his claim has not been cognizable in court at all.

In Astor *vs.* Girard, 4 Wash. C. Ct. R., 711, it was held, that the statute commences to run from the time the party has the right of action, or may bring his suit against another.

In order that the statute of limitations may run, "*there must be not only a person to bring the suit, but also a person to be sued.*" (Angell on Lim., sec. 62, p. 49, 5th ed.) This reasonable rule was fully recognized in Montgomery *vs.* Hernandez & Co., 12 Wheat. R. (U. S.), 129.

Where, by the provisions of a statute, the plaintiff cannot sue or the defendant cannot be sued, the limitation does not run. (See Augell on Lim., sec. 63, p. 51, 5th ed., and cases cited in note.)

The running of the limitation is not only prevented or suspended by statute, but also by operation of war. During the late rebellion the running of the statutes of the States in rebellion were held to be suspended as to citizens in the loyal States. (See Hanger *vs.* Abbott, 6 Wall., 532; also, 9 Wall., 687, and 11 Wall., 244, 493 and 508.)

T. W. BARTLEY,
Attorney for Appellant.

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SUPREME COURT, U.S.
FILED
JAN 26 1883
JAMES R. McKENNEY, Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

KENDALL
v.
THE UNITED STATES. } No. 168.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

KENDALL
v.
THE UNITED STATES. } No. 168.

BRIEF FOR THE UNITED STATES.

This is a claim for compensation for work done in raising, during December, 1865, a vessel then sunk in Mobile Bay (folio 11).

The petition was filed in November, 1872.

A plea of the six-years' limitation upon such suits was filed in August, 1874 (folio 5).

In December, 1878, a motion was made to strike this plea off the file as having been filed in violation of a rule of court (folio 6). This motion was denied February 10, 1879, upon the ground that no plea was necessary in order to set up the defense in question (folio 7).

Thereupon the claimant amended his petition by setting forth (folio 12), in avoidance of the anticipated defense,

the fact of his participation in the rebellion, and that until the general pardon, December 25, 1868, he had been disqualified for suing (folio 11).

To the petition so amended the United States demurred (folio 13).

The court sustained the demurrer, and dismissed the petition (folio 14).

The statutory provision as to the time within which such claims against the United States must be filed is given upon folio 7 of the record.

It seems plain that this provision contains a statutory notice to the Court of Claims quite independent of action or laches thereabouts by the counsel who appear for the Government.

The bar need not be specially pleaded, because it defines a condition precedent to the right of suit itself. (See Cheatham's case, 92 U. S., page 89.)

The claimant's contention as to the effect of his rebel character upon the above limitation seems *anomalous*—amounting as it does to *an endeavor to obviate the effect of one bar by showing the existence of an additional one*; and thus to convert what was intended to be *a sword* of the United States into *a shield* for himself.

S. F. PHILLIPS,
Solicitor-General.